the technical knowledge (GX 1, pp. 3-4; Tr. 395-396, 1163-1164).

b. Separate specifications are published for the solid type, and different specifications are published for the other types (Tr. 229-230).

c. The price trend for solid type does not necessarily follow the price trends for other types (Tr. 413-414). Foreign competition is significant in the solid type, but not in the other types (*ibid.*).

d. The industry recognizes the division of paper insulated power cables into solid type and other types, and treats the solid type as a separate product (GX 169).

e. Eight companies were engaged in producing the solid type, whereas a distinct group of four of them (not including KWC) produced the other types (Tr. 152).

The district court found that "in the main, paper insulated power cable has no effective competition in the area of its major use from other types of insulated power cable" (J.S. 10a-11a). This is true only if the limiting expression—"in the main"—is intended to restrict the finding to the "other types", which KWC did not make but which represented the majority of Okonite's sales. The government's expert witnesses testified that the solid type has effective competition from rubber and plastic insulated power cables (Tr. 405-413, 1212-1213, 1945-1946).*

* The government's technical expert testified that plastic insulated power cable will soon be standard construction where solid type paper insulated power cables have been used (Tr. 412).

The government's final argument is the supposed "administrative difficulty (if not impossibility) of inventing, defining, and measuring novel subcategories" (M.A. 17), but there is no such difficulty; the solid type subcategory is well established and statistics for it are collected by the industry's trade association (GX 169).

The selection of a submarket can be supported only if it has economic reality, and then only to the extent that it is the area in which the two merging companies compete.

The decision below cannot be supported on either of these tests. There is no economic reality in (i) including in a small submarket different products which require different equipment and expertness, such as solid type paper insulated power cables on the one hand, and on the other hand the other types of paper insulated power cables which are used in different applications and which carry electricity at higher voltages, and (ii) putting in separate submarkets the other insulated power cables which compete with the solid type paper insulated power cables for the transmission of electricity in the voltage range of the solid type cables, *i.e.*, rubber and plastic insulated power cables.

3. The evidence is that Okonite and KWC did not compete in "paper insulated power cable".* The government has never contended that KWC competed in the "other

* The Motion to Affirm states that "Kennecott itself recognized that the product duplication between it and Okonite lay in the field of paper-insulated power cable (see GX 1, p. 7)" (M.A. 16 n.9); reference to the cited source will show that the government has excised the important words which complete the statement: "for lower voltages". This truncated quotation appears not only in the footnote on page 16 of the Motion to Affirm but also in the footnote on page 18.

types", which it admits represented 55 percent of Okonite's 1958 sales of paper insulated power cables.*

The government understandably argues a theory of *per se* illegality, despite the differences between this case and *Alcoa,* since all of the economic evidence tends to disprove any adverse effect on competition. We mention just a few of these facts.

a. The insubstantiality of KWC's competition is evidenced by the fact that the total gross cost of KWC's facilities used to make solid type paper insulated power cables was less than $325,000 (Tr. 2039-2049)**; in comparison, it cost $8 million (borrowed from Kennecott) just to re-equip the Okonite facilities to make paper insulated power cables so that it could be competitive with General Cable, Anaconda and Phelps Dodge (Tr. 1116-1117, 1220-1223, 2050, 2323-2325).

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* Four of the eight producers of paper insulated power cables (U.S. Steel, Colorado Fuel & Iron, Simplex and KWC) made only solid type cables (Tr. 152, 387-388). There is no sales breakdown in the record between solid type and other types for General Cable, Anaconda, or Phelps Dodge, which, like Okonite, made all types. However, Okonite's share of sales of solid type paper insulated power cables was necessarily less than its 19.6% share of all types of paper insulated power cables.

Moreover, there are substantial imports of the solid type cables, which would reduce the percentage shares of all domestic producers. Imports of solid type cables on the West Coast alone were about twice KWC's $800,000 of sales of that product nationally in 1958 (Tr. 361). Thus, in making a comparison with Alcoa's 27.8% of aluminum wire and cable, the correct figure is not Okonite's 19.6% of domestic producers' sales of all types of paper insulated power cables, but its substantially lower percentage of solid type cable sales.

** Production at KWC's inadequate, obsolete and badly located facilities has been discontinued (Tr. 635-636).

b. The government's expert testified that, before making this expenditure, Okonite did not have the facilities to compete with General Cable, Anaconda or Phelps Dodge in the manufacture of very high voltage paper insulated power cables (Tr. 397), and that Okonite's facilities did not permit it to make an acceptable product at lower voltages at which Okonite had taken orders (Tr. 400-402).

c. The government witnesses who were purchasers of power cable testified that the elimination of KWC as a producer of such cables would not affect them in any way (*e.g.*, Tr. 414).

d. It is extremely doubtful that Okonite would be a viable competitor today except for the financing made available by Kennecott; Okonite could not match the financial resources of General Cable, Anaconda and Phelps Dodge (DX 10-11) and was in imminent danger of falling out of competition altogether.

This Court's decision in *Alcoa* did not lay down a rule of *per se* illegality regardless of economic realities, yet the decision in the district court necessarily assumes such a *per se* rule, as does the government's argument here.

2. Refined Copper

The government's argument is this: "Under *Brown Shoe Co. v. United States*, 370 U.S. 294, Section 7 of the Clayton Act prohibits Kennecott's acquisition of a major customer for refined copper (Okonite) as a part of a significant trend toward vertical integration by copper producers" (M.A. 18-19). Again, there is no reference to competition.

This Court took great pains in *Brown Shoe* to point out that it applies no rule of *per se* illegality. That decision was based on an analysis of the facts in that case, which were far different from those here.

1. In *Brown Shoe* there was substantial evidence of injury to retail stores competing for business with the Kinney retail stores. 370 U.S. at 344. There was no such evidence in this case. In *Brown Shoe* there was evidence that Kinney represented a substantial market for certain small independent shoe manufacturers. *Id.* at 303, 332, 345. There is no comparable evidence here.

In the period 1954-1958, Okonite's largest suppliers of refined copper were Kennecott, Phelps Dodge and American Metal Co. Ltd. (GX 235). Over half of the copper supplied by American Metal came from foreign sources (*ibid.*). In 1958, 82.0% of Okonite's copper purchases were made pursuant to term contracts with American Metal and British Metal Corp. of Canada. These companies supplied about 67.0% of Okonite's requirements in 1957 (GX 235; DX 16).

The government could find no copper producer who thought that he could be injured by Kennecott's acquisition of Okonite. Independent domestic producers supplied an average of only about 1,600 tons per year of the copper purchased by Okonite during the years 1954-1958 (GX 235). Total domestic consumption averaged about 1,375,000 tons per year during that period (GX 419).

Okonite was not a substantial customer for copper. Considering the extent of Okonite's foreign purchases, and the fact that Okonite could and did look to the world market for its supply, the relative importance of Okonite as a cus-

tomer is measured by its purchases of 0.3% of free world copper production (DX 16, 85). Even from the viewpoint of the domestic copper market, Okonite represented less than 1% of the demand side of the market (GX 471, Table 5; DX 16) and annual increases in domestic production have been five times as great as Okonite's total purchases of copper from both domestic and foreign sources (GX 419; DX 16).

It is in that context that we must view the fact that by applying 1963 copper prices to Okonite's 1958 tonnage purchases of copper from both domestic and foreign sources, the Motion to Affirm achieves a dollar volume of over $6 million (M.A. 19-20). But compare *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 333-34, where this Court characterized a pre-emption of less than 1% of the market as "conservatively speaking, quite insubstantial," and stated: "It is urged that the present contract pre-empts competition to the extent of purchases worth perhaps $128,000,000, and that this 'is, of course, not insignificant or insubstantial.' While $128,000,000 is a considerable sum of money, even in these days, the dollar volume, by itself, is not the test, as we have pointed out."

The Motion to Affirm repeats again and again the irrelevant (and inaccurate) statement that Okonite was the largest or the second largest independent producer of insulated wire and cable. The district court having found no adverse effect of the acquisition on the insulated wire and cable market, analysis of that market has become irrelevant. Looked at from the point of view of the market for refined copper, it makes no difference whether very large wire and cable fabricators such as Western Electric, Gen-

eral Electric or General Motors, for example, are "independent", or what kinds of insulated wire and cable Essex produced; these considerations do not affect the fact that they purchase many times as much copper as Okonite for fabrication into insulated wire and cable, they are not controlled by any copper producer, and are not "foreclosed" as customers of non-integrated copper producers.

2. The government's main argument is that there has been a trend toward integration of copper producers and copper fabricators, but no attempt is made to prove this supposed trend. Proof is not afforded by the fact that in 1958 Anaconda shipped 93.7% of its copper to its own fabricating facilities, Phelps Dodge shipped 76.8%, and Inspiration (of which Anaconda is a substantial stockholder) sent 40% of its shipments to subsidiaries of Anaconda.* The figure for Kennecott was 25.2% (GX 430).

These are static figures for the year 1958, and the government bases its argument on a supposed trend toward further integration. It makes no attempt, however, to demonstrate such a trend, which is in fact non-existent. The refined copper shipped by Anaconda, Phelps Dodge and Kennecott and consumed by their fabricating subsidiaries or divisions, including both wire mills and brass mills, represented a markedly declining percentage of total domestic shipments of refined copper before the acquisition of Okonite in 1958, and the declining trend continued after that acquisition. The percentages for these three separate companies, in the aggregate, were 28% in 1955, 22% in

* A footnote in the Court's opinion points out that a majority of the shipments by Phelps Dodge were destined for reshipment to independent fabricators, and this was true to a lesser extent of Anaconda (see J.S. 24a fn.).

1958 and 20% in 1961, even though Kennecott's shipments to Okonite are included for 1961 and not for the earlier years (GX 430, 457, 458, 471, Table 6). These figures were set forth in the Jurisdictional Statement (J.S. 20-21) and are not disputed.*

The evidence destroys the government's premise of a trend toward greater vertical integration**; the evidence discloses the opposite of the trend found in *Brown Shoe*.

3. The government assumes, as did the district court, that the independent wire and cable fabricator cannot survive in competition with the integrated companies, principally Anaconda, Phelps Dodge and General Cable. But this premise is contrary to the evidence. The evidence showed that most wire and cable companies are operating profitably despite industry overcapacity (DX 41), and

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* Nor is there any dispute that Kennecott's share of domestic copper shipments declined from 33% in 1954 to 20% in 1962 (J.S. 16).

** Contrary to the figures in the Motion to Affirm on the extent of integration of Anaconda, Phelps Dodge and Kennecott, the government's own exhibits show the constant decline in the aggregate of the percentages of those companies' copper shipments consumed by their fabricating subsidiaries, including both brass mills and wire mills:

Year	Percentage of Refined Copper Produced by Anaconda, Phelps Dodge and Kennecott and Consumed by Their Own Fabricating Subsidiaries
1955	46.0
1956	45.6
1957	46.3
1958	42.7
1959	43.8
1960	40.8
1961	39.0

Source: GX 430, 457, 458.

that price reductions were usually initiated by the independent companies (Tr. 1628-1629).*

The very real danger that Okonite would not have survived as an independent company resulted from circumstances peculiar to it, which are briefly summarized at pages 11-13 of the Jurisdictional Statement. Okonite had failed to keep its production facilities modern and efficient, and sales were declining because some of its major products were becoming obsolete as competitors developed cheaper and better substitutes. In a belated attempt to enter the low-cost, mass-production market, Okonite spent all the money it had or could borrow, but found itself unable to operate the new facilities profitably. In order to survive, Okonite had not only to expand but also to spend millions of dollars, which it did not have, for new equipment to make its existing products satisfactorily. Thus, the threat to Okonite's survival was the result of a combination of its old and inefficient production facilities, its declining sales of obsolescent products, and the exhaustion of its financial resources.

4. Nor did the district court find—as the government now argues (M.A. 21)—that integration resulted in cost advantages; on the contrary, it found that "there is neither any claim nor any evidence that integration between copper production and fabrication results in cost savings" (compare M.A. 21 with J.S. 23a). The district court's argument was that, if there were no profit in fabrication,

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* Kennecott's executive vice-president did not testify, as the government asserts, that integration resulted in a "squeeze" on independent fabricators (compare M.A. 20 with GX 1, pp. 1-2, and Tr. 2283-2284).

the integrated companies would nevertheless have an alternative opportunity to profit on the metal.

This argument has several defects. First, no company would make substantial investments in two businesses, both of which are highly competitive, and plan to let the profits from one of them be eaten up by losses in the other. Second, wire and cable fabricators like Western Electric, General Electric, General Motors, Westinghouse and U. S. Steel also have alternative opportunities for profit which would justify their waiting out any hypothetical period of losses in wire and cable fabrication. But the basic defect in this line of argument is that the competent wire and cable fabricators operate profitably (DX 41) and there is no "squeeze".

5. Moreover, the government's argumentation is essentially irrelevant to the issue to be decided, which is whether the Okonite acquisition may substantially lessen competition in *refined copper*. It is pointless for it to argue about whether there might be a lessening of competition in the wire and cable industry, because the district court found no danger that the Okonite acquisition might lessen competition in that industry.

In the Jurisdictional Statement, appellant pointed out that, in the district court's analysis of the effect of the Okonite acquisition in the refined copper industry, the essential finding was that the independent copper producers would have no place to sell their copper. The error of this finding was pointed out in the Jurisdictional Statement.

The Motion to Affirm does not attempt to support this indispensable finding of the district court.

The government has thus abandoned the district court's rationale for decision. Under the circumstances, it can hardly claim that the district court was so clearly correct that this Court should not review the decision.

3. The District Court's Injunction

The Motion to Affirm does not deny that a substantial question is presented by the fact that the district court's decree enjoins lawful conduct. The government does not even address this important question.

The district court found no likelihood that Kennecott would make any unlawful acquisitions in the future, and did not base its injunction on any such threatened conduct. An injunction was therefore not warranted. See *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633.

CONCLUSION

The Motion To Affirm Should Be Denied

The Motion to Affirm does not meet the issues raised by the Jurisdictional Statement, and generally ignores the facts of record there cited as disproving the district court's findings and conclusions.

The government has failed to demonstrate a parallel between this case and *Alcoa* or *Brown Shoe*, and abandons the untenable basic premise of the district court that the effect of the Okonite acquisition may be the disappearance of all independent wire and cable fabricators, with the result that independent copper producers would have no place to sell their copper.

The Motion to Affirm never discusses competition, but seems to ask this Court to join in reading out of the statute the concept that it is addressed to competition.

The judgment below with respect to the so-called paper insulated power cable line of commerce can be sustained only by (i) accepting an artificial submarket which defies the economic realities here involved by including all disparate kinds of paper insulated power cables and excluding other types of power cable which compete directly with solid type paper insulated power cables, and then by (ii) reading the *Alcoa* case as making illegal *per se* any horizontal combination involving much smaller market shares, much weaker competitors, and entirely different markets than were involved in that case.

The district court's decree cannot be sustained even if its incorrect decision on paper insulated power cables as a "submarket" is affirmed. This would affect only a small portion of the businesses of Okonite and KWC and would not justify the broad relief granted.

An affirmance of the decision on the refined copper line of commerce would require a holding that the acquisition of a customer is illegal *per se,* because all other bases for the decision below are either factually or logically untenable.

There are also the novel questions whether a decree in a Section 7 case should be so broad as to enjoin lawful conduct, without any finding to justify such a broad decree, where the consequence may be to injure rather than promote competition and the economy of the industry, and whether an injunction is warranted when there is no likelihood of recurring violations.

The Motion to Affirm should be denied.

Respectfully submitted,

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